Filed 6/4/12 P. v. Escobar CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BYRON ESTURADO ESCOBAR, Defendant and Appellant.	G045162 (Super. Ct. No. 06NF2733) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick H. Donahue, Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, Lynne G. McGinnis, and Kate Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Although a jury was unable to reach a verdict on seven of eight counts of aggravated sexual assault on a child (Pen. Code, § 269, subd. (a)(1); all further statutory references are to this code) and a mistrial was declared on those counts, it found defendant Byron Esturado Escobar guilty of count 8. Defendant subsequently pleaded guilty to amended counts 1 through 7, alleging lewd acts upon a child under age 14 in violation of section 288, subdivision (a), with an additional allegation the crimes involved substantial sexual conduct (§ 1203.066, subd. (a)(8)). The court sentenced him to 25 years to life.

Defendant contends the court erred in failing to instruct the jury on the lesser included offense of battery and refusing to redact statements in his interview with police. He also requests this court conduct an in camera review of the victim's school records to determine if the trial court abused its discretion in finding they contained no information bearing on the victim's honesty and were not discoverable. Finding no error, we affirm.

FACTS

Defendant and his wife immigrated to the United States, leaving the victim, their eldest child, living with her grandparents in Guatemala. The victim joined the family in March 2004, when she was 10 years old and the family was living in a one-bedroom apartment. While the victim's mother worked days, defendant was the victim's primary caregiver when she was not at school.

About a week after she arrived, defendant started sexually assaulting her. He would send her siblings to the store and molest her daily except when she was menstruating by removing her clothing, touching her breasts, and putting his "middle part" (penis) or finger into the victim's "middle part" (vagina). Occasionally, he put his mouth on the victim's "middle part" and kissed it. He threatened to hurt family members

or send her back to Guatemala if she told anybody. When she told him "no," defendant got angry and hit her with cords from an iron or a vacuum cleaner. He once also made her kneel on a bag of beans for 30 minutes and on other occasions grabbed her throat and choked her.

The victim's mother stopped working around October 2004 and a few months later, the family moved to a two-bedroom apartment. The molestations became less frequent but continued to occur whenever the mother left the house. Defendant also demanded sex in return for his permission for the victim to buy something or go somewhere. Defendant would lay on top of the victim and put his penis in her vagina. The victim saw a "white thing" come out of his penis. About two weeks before the victim reported the abuse, defendant forced the victim to have intercourse with him while the mother was at church and the victim's siblings were sleeping. He stopped when the youngest child started crying.

In July 2006, the then 12-year-old victim asked for permission to go on a field trip but defendant said, "No, you can't go if you don't give me nothing." Tired of the abuse the victim told her uncles, who resided with the family. The next day, the uncles took her to their pastor's home.

A genital and anal examination of the victim on August 1 revealed no lesions or injuries to the hymen, anus, or external genitalia and neither confirmed nor negated sexual abuse had occurred. According to the examiner, the absence of visible injuries is not unusual where an exam is done a period of time after the last event, as minor injuries can heal within two weeks without leaving a trace.

After the victim placed a covert call to defendant, a detective arrested him. Defendant waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]) and agreed to talk. Although he initially denied any sexual misconduct with the victim, he later admitted touching her breast and vagina with his hand while giving her advice about sex and telling her to "take care of . . . [her] parts."

He also admitted penetrating her vagina about one inch, which he defined as with his finger but repeatedly denied having sex, placing his penis inside her vagina.

Defendant admitted that about two weeks earlier his penis touched the victim's vagina when they were standing face to face. He was "sure . . . there was not penetration" but acknowledged "maybe it slipped." They had been standing, with the victim undressed from the waist down, and he "bumped" her with his penis. He put his penis on her "part" and rubbed her vagina with it but did not put it inside. He put his penis on or touched her vagina with it on three separate occasions but it was "not inside." According to defendant, a penis touching a vagina is "not sex." He had never had sex with the victim, although on one occasion he rubbed his penis back and forth on her vagina.

DISCUSSION

1. Failure to Instruct on Battery

Whether instructions on simple battery should be given was apparently discussed off the record. Subsequently, the prosecutor stated on the record she "believe[d] we all agreed [battery] is not a lesser included offense." The court commented, "I think the assault is a lesser included offense. [Defense counsel], I think you are in agreement with that?" Defense counsel responded, "Yes." Thereafter, the court instructed the jury on the elements of aggravated sexual assault of a child, including proof defendant committed rape. The jury was also given separate verdict forms and instructed on the lesser included offenses of assault with intent to commit rape and simple assault.

As an initial matter, we agree with defendant his counsel's agreement with the prosecutor did not constitute invited error. "Invited error . . . will only be found if counsel expresses a deliberate purpose in resisting or acceding to the complained-of

instruction [citations]." (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) Because the record here does not reveal such a purpose, no invited error can be deemed to have occurred.

We turn now to defendant's main contention the court erred by not instructing the jury on battery. The Attorney General concedes battery is included in the greater offense of forcible rape. (*People v. Hughes* (2002) 27 Cal.4th 287, 366.) But to trigger the court's duty to instruct on lesser included offenses, there must be "substantial evidence raising a question as to whether all of the elements of the charged greater offense are present. [Citations.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) The """evidence that the defendant is guilty only of the lesser offense [must be] 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed."' [Citation.]" (*Ibid.*) If "the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime . . . the jury need not be instructed on any lesser included offense." (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5.) """[W]e independently review the question whether the trial court failed to instruct on a lesser included offense." [Citation.]' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 293.) A defendant must show a reasonable probability of prejudice from a breach of this duty in order to obtain a reversal of the conviction. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 178 [failure to instruct on lesser included offense in noncapital cases is subject to a *Watson* standard of harmless error].)

The evidence at trial did not support a finding defendant was guilty only of the lesser offense of battery and not of the charged offense of aggravated sexual assault by rape. The victim testified that after her mother stopped working in October 2004 and both parents were home, defendant "continue[d] putting his middle part in [her] middle part," referring to his penis and her vagina, every time her mother left the house. He did

that multiple times while she was lying on her back on the bed looking up. She tried to pull away but was not able to because he was too strong. Once or twice, she saw a "white thing" come out of his penis and other times she felt a watery substance when his penis was inside her.

During his interview, defendant admitted touching and penetrating the victim's vagina with his finger but denied having sex with her or penetrating her vagina with his penis. But he also conceded "maybe it slipped" when they were standing facing each other and the victim was undressed from the waist down. He claimed he was not paying attention and "bumped it" when he put his penis on "her part." He had placed his penis between her legs and "was touching her part." He rubbed his penis on her vagina and moved it back and forth, similar to having sex, on three separate occasions.

Based on these facts, no reasonable jury could conclude defendant was guilty only of battery. Although defendant maintains his penis never penetrated the victim's vagina, his admission it may have "slipped" and "bumped" her vagina implies it at least penetrated the entrance of it. "'"[P]enetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina."' [Citation.]" (*People v. Rouse* (2012) 203 Cal.App.4th 1246, 1276.) Whether the jury believed the victim or defendant, there was no middle ground in the evidence that could have permitted a reasonable jury to conclude that battery, but not rape, was committed. Nor was there substantial evidence that any contact between defendant and the victim was unrelated to a sexual assault. Rather, "the evidence here establishing . . . a battery as a matter of law must also establish the commission of rape. Accordingly, if [defendant] is guilty of battery, he is also guilty of the greater offense. It is not error to refuse to instruct the jury of their right to convict of lesser offenses included in the offense charged when the evidence shows that the defendant, if guilty at all, is also guilty of the crime charged. [Citations.]" (*People v. Young* (1970) 9 Cal.App.3d 106, 109.) Consequently, the trial

court did not err in failing to instruct the jury on simple battery as a lesser included offense of the charged offense.

2. In Camera Review of the Victim's School Records

Outside the presence of counsel, the court conducted an in camera review of the victim's school records subpoenaed by defense counsel. It saw nothing having "to do with honesty or anything else involved" and sealed the records. Defendant asks that we independently examine the sealed records to determine whether the court abused its discretion and the Attorney General does not oppose the request. We have reviewed the records and uphold the court's ruling.

3. Refusal to Redact Statements

Before the jury received a DVD-recording and transcript of defendant's interview with police, defendant moved to redact certain statements made by the investigating detective. The court granted the motion as to some statements, finding them prejudicial, but denied it as to others. Defendant contends the court abused its discretion in refusing to redact two statements. We address each in turn.

a. Vouching

The court declined to redact the detective's statement, "I don't think she (the victim) will lie at her age." Defense counsel argued the detective was vouching for the victim's credibility but the court disagreed because "she is not really telling the jurors that this girl doesn't lie," and thus, as phrased, the statement was admissible as more probative than prejudicial.

On appeal defendant repeats the claim of improper vouching. The contention lacks merit. "Impermissible 'vouching' may occur where . . . the prestige of the government [is placed] behind a witness through personal assurances of the witness's

veracity or [it is] suggest[ed] that information not presented to the jury supports the witness's testimony. [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 211.) Thus, a police officer may not offer such testimony as an expert witness, and "may testify [as a lay witness] in the form of an opinion only when he cannot adequately describe his observations without using opinion wording. [Citation.]" (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40; see also *People v. Melton* (1988) 44 Cal.3d 713, 744 [lay witness may state ultimate opinion based on perception "where the concrete observations on which the opinion is based cannot otherwise be conveyed"].)

Defendant acknowledges the detective did not testify the victim was credible. Nor was the statement made to convince the jurors of the victim's veracity. The detective testified on direct examination it was not her job to determine if the victim was telling the truth and that she was merely using an interview technique. On cross-examination, she confirmed she was "not casting any opinion as to the truth or the validity of the accuracy of anything that [the victim] might have been saying to [her]" because it was "not her job to determine whether she is credible or not credible . . . ." We also note the prestige of the police was not placed behind the victim since the statement, as phrased, did not suggest the detective was personally assuring the victim's credibility or that it was based on information not presented to the jury. Moreover, the style of the detective's interrogation of defendant was such she could not "adequately describe [her] observations without using opinion wording" (*People v. Sergill, supra*, 138 Cal.App.3d at p. 40) in her questioning.

Even if the statement constituted improper vouching as defendant contends, any error in not redacting it was harmless. (*People v. Melton, supra*, 44 Cal.3d at p. 745 [*Watson* standard of error applies].) In addition to the detective's testimony she was not offering any opinion on the victim's veracity, her statement about the victim's veracity involved a single, brief statement made to defendant during a lengthy passage in which he was told the victim would be given medical tests that would reveal any assault, that a

girl who loves her father would not want to accuse him but if he said nothing happened he would be calling her a liar, and requesting defendant to be honest with him.

In addition, the jury was instructed: "You alone must judge the credibility and believability of the witnesses." (CALCRIM No. 226.) That the jury did not blindly accept and adopt the view the victim was completely truthful is evidenced by its inability to reach a verdict on counts 1 through 7. Absent any evidence to the contrary, we assume the jury followed the instruction and conclude the court did not abuse its discretion by declining to redact the challenged statement from the interview tape. (*People v. Harris* (2005) 37 Cal.4th 310, 350.)

b. Suggestion Defendant Would Testify

The court also refused to redact the detective's statement, "Okay, but I'm saying when the day is here to be in front of the judge I don't want you to come in lying at that time. And it's like I'm telling you if . . . we stay here all night I want the complete truth. Because once I write the report that will [be] final and it's not going to change. Once we are done I will not speak to you anymore, we will be done. . . . Like you say this is serious. You have to remember if there was another time . . . because if she says it was another time, that it was more than one time . . . ." Defense counsel challenged the passage due to concern the jury would expect defendant to testify in court and that the detective believed he would lie if he did. Rejecting the argument, the court found the passage more probative than prejudicial and not improper.

Defendant asserts the court's ruling violated the prohibitions against hearsay and commenting on a defendant's failure to speak. We are not persuaded a reasonable jury would conclude the detective was suggesting defendant would testify and lie on the stand, as defendant contends. The statement was brief, and distinct from testimony at trial, was made as part of the detective's standard interviewing techniques in her attempt to obtain a confession from defendant. Moreover, the jury was instructed

defendant had the absolute right not to testify. (CALCRIM No. 355.) We assume the jury followed that instruction, where, as here, defendant has not shown otherwise. (*People v. Harris*, *supra*, 37 Cal.4th at p. 350.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.